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Public Prosecutor v Vasanta a/l Amarasekera

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS WA-41H-40–10 OF 2022 AND WA-41S-25–10 OF 2022
NOORIN BADARUDDIN J
14 NOVEMBER 2023

C *Criminal Law — Forgery — Will — Lawyer who prepared will for friend was found guilty of forging testator's signature therein — Whether magistrate's conviction of lawyer was plainly wrong — Whether evidence showed lawyer had no prior knowledge or specimens of testator's signature in order to forge it — Whether magistrate failed to appreciate that lawyer's defence and version of*
D *events was un-rebutted by prosecution — Whether prosecution could not show that lawyer had motive to forge will — Whether affidavits by lawyer and another person to say they witnessed testator signing the will stood un-rebutted — Whether evidence of prosecution's handwriting experts that testator's signature in will appeared different from signatures in other documents was insufficient in itself to*
E *establish forgery*

The respondent, an advocate and solicitor, was convicted and sentenced to 18 months' jail by the magistrate's court after being found guilty of forging a testator's signature on a will, an offence under s 467 of the Penal Code. In the
F instant appeal, the prosecution sought to have the sentence enhanced whilst the respondent appealed against the conviction and sentence. According to the respondent, the testator ('Rex'), who was his friend, came to his office in June 2005 wanting to have a will prepared. The respondent said that after the will was prepared, he and another friend, PW4, who also knew Rex, witnessed Rex's
G execution of the will in the respondent's office. Thereafter, the original of the will was given to Rex and the respondent kept a copy of it. Following Rex's death about nine months later, the respondent came to know that Rex's family was making public enquiries as to whether anyone knew if Rex had left a will and to contact the family's lawyer if they did. The respondent forwarded his
H copy of the will to the family's lawyer who applied to the High Court for probate supported by the affidavits of the respondent and PW4 who averred that they had witnessed Rex executing the will. Grant of probate was issued and the respondent's brother, DW3, was named as the executor. Rex's wife, PW3, however, asserted that Rex had never made a will and said that the signature in
I the will that the respondent had produced was not Rex's. Her civil suit to challenge the validity of the will was rejected by the courts. Meanwhile, with regard to the s 467 of the Penal Code charge against the respondent, the magistrate found that the prosecution had proven its case beyond reasonable doubt. In coming to that conclusion, the magistrate relied heavily upon the

evidence of the prosecution's handwriting experts, PW1 and PW2, who were from the forensic departments of, respectively, the Chemistry Department and the Royal Malaysian Police. Both those experts (whose evidence the magistrate preferred over the evidence of the respondent's handwriting expert, DW2) were of the view that Rex's purported signature in the will was different from his signatures in other specimen documents. The magistrate concluded that since the respondent was the only person who had access to the will and no one else knew of its existence, he must have forged Rex's signature on the document. In the instant appeal, the respondent argued that the magistrate's decision was perverse as she failed to consider PW4's affidavit wherein he affirmed having witnessed Rex's signing of the will, an averment that PW4 repeated when his cautioned statement under s 112 of the Criminal Procedure Code ('CPC') was recorded by police. The respondent submitted that instead of finding that his defence had not been rebutted by the prosecution, the magistrate had come to a perverse verdict by taking irrelevant matters into account.

Held, dismissing the prosecution's appeal, setting aside the conviction and sentence and acquitting and discharging the respondent:

(1) The magistrate had failed to consider whether the prosecution had proven the very essential ingredient of 'dishonesty' on the respondent's part in order to succeed on the forgery charge. The grounds on which the magistrate convicted the respondent were clearly misplaced (see paras 38–41).

(2) A crucial issue on which the respondent's testimony was unchallenged was his assertion that he had no prior knowledge of what Rex's signature looked like in order to forge the signature. The investigating officer of the case testified that there was no evidence that the respondent had possession of samples or specimens of Rex's signature. So, there was no evidence at all of how the respondent could have forged Rex's signature (see para 53).

(3) The handwriting experts, PW1 and PW2, took the view that the signature of Rex in the will differed in certain characteristics from other samples of his signature whilst DW2 opined that the signature in the will and in the samples were sufficiently similar. Based on the evidence, this court found that: (a) PW2 formed her opinion based on photocopy specimens of Rex's signature, which, according to the Chemistry Department requirements, were inappropriate to be used for comparison and would affect the examination. Further, apart from using the Video Spectral Comparator 6000, PW2's assessment was based on a naked-eye evaluation; (b) PW1 did not use any equipment at all and her evidence lacked detail in terms of examination and analysis; and (c) DW2 had used

five types of equipment and his examination, analysis and conclusion were meticulous and more credible than those of PW1 and PW2 (see paras 54 & 60–70).

(4) The court found the respondent to be a wholly disinterested witness with regard to the will. Motive was a relevant factor and the respondent testified that he had no intention/motive to forge the will. The magistrate failed to evaluate that defence and the failure to do so was fatal because dishonesty on the respondent's part was crucial to prove the charge of forgery (see paras 41, 44 & 47–48).

(5) The respondent's version of facts or defence was never challenged by the prosecution in cross-examination. The appellant had given a detailed account of what happened between him and Rex at his office in his witness statement, and in the absence of mens rea on the respondent's part which remained un-rebutted, his version must therefore be accepted. The magistrate failed to address this issue. It was an error in law and in fact on the magistrate's part (see paras 49 & 52).

(6) PW4's affidavit in which he averred that he witnessed Rex's execution of the will was a contemporaneous document which the magistrate failed to give proper weight to. The affidavit corroborated the respondent's evidence. And there was further corroboration when the investigating officer, PW8, confirmed in his testimony that PW4 had repeated the averments in his affidavit when he gave his s 112 of the CPC statement to the police (see paras 75–78).

(7) There was insufficient judicial appreciation of the entire evidence that was adduced before the magistrate. This coupled with the prosecution's failure to challenge the respondent's version of the events and its cross-examination of the witnesses on matters that were irrelevant to the charge left the validity of the will intact and in no way proved that the respondent had forged Rex's signature in the will (see paras 79–80).

[Bahasa Malaysia summary

Responden yang merupakan seorang peguam bela dan peguam cara, telah disabitkan dan dijatuhkan hukuman penjara 18 bulan oleh mahkamah majistret selepas didapati bersalah kerana memalsukan tandatangan pewasiat, satu kesalahan di bawah s 467 Kanun Keseksaan. Dalam rayuan ini, pihak pendakwaan memohon hukuman ditambah manakala responden merayu terhadap sabitan dan hukuman itu. Menurut responden, pewasiat ('Rex'), yang merupakan rakannya, datang ke pejabatnya pada Jun 2005 untuk penyediaan wasiat. Responden menghujahkan bahawa selepas wasiat disediakan, dia dan seorang lagi rakannya, PW4, yang juga mengenali Rex, menyaksikan pelaksanaan wasiat Rex di pejabat responden. Selepas itu, salinan asal wasiat diberikan kepada Rex dan responden menyimpan salinannya. Setelah kematian Rex kira-kira sembilan bulan kemudian, responden mendapat tahu

bahawa keluarga Rex membuat pertanyaan awam mengenai kewujudan wasiat Rex dan menghubungi peguam keluarga sekiranya terdapat maklumat tersebut. Responden mengemukakan salinan wasiat itu kepada peguam keluarga itu yang memohon kepada Mahkamah Tinggi untuk geran probet dikeluarkan dan disokong oleh afidavit responden yang SP4 menyatakan bahawa mereka telah menyaksikan Rex melaksanakan wasiat itu. Geran Probet dikeluarkan dan abang responden, SD3, dinamakan sebagai pelaksana. Isteri Rex, SP3, menegaskan bahawa Rex tidak pernah membuat wasiat itu dan menyatakan bahawa tandatangan dalam wasiat bukanlah milik Rex. Saman sivilnya yang mencabar keesahan wasiat itu ditolak oleh mahkamah. Sementara itu, mengenai pertuduhan s 467 Kanun Keseksaan terhadap responden, majistret mendapati bahawa pihak pendakwaan berjaya membuktikan kesnya melampaui keraguan munasabah. Ketika membuat keputusan tersebut, majistret banyak bergantung kepada keterangan pakar tulisan tangan pihak pendakwaan, SP1 dan SP2, yang masing-masing dari jabatan forensik, Jabatan Kimia dan Polis Diraja Malaysia. Kedua-dua pakar itu (yang mana keterangannya diterima pakai oleh majistret berbanding keterangan pakar tulisan tangan responden, SD2) berpendapat bahawa tandatangan Rex yang dikatakan di dalam wasiat itu adalah berbeza daripada tandatangannya dalam dokumen spesimen lain. Majistret membuat kesimpulan bahawa oleh kerana responden adalah satu-satunya orang yang mempunyai akses kepada wasiat dan tiada orang lain yang mengetahui kewujudannya dan dia semestinya telah memalsukan tandatangan Rex pada dokumen itu. Dalam rayuan ini, responden berhujah bahawa keputusan majistret adalah berat sebelah kerana gagal mempertimbangkan afidavit SP4 di mana dia telah menyaksikan Rex menandatangani wasiat itu, yang mana SP4 berulang kali juga menyatakannya di dalam pernyataan di bawah s 112 Kanun Tatacara Jenayah ('KTJ') kepada polis. Responden berhujah bahawa pembelaannya tidak dicabar oleh pihak pendakwaan dan majistret telah membuat keputusan salah dengan mengambil kira perkara yang tidak relevan.

Diputuskan, menolak rayuan pendakwaan, mengenepikan sabitan dan hukuman dan melepaskan dan membebaskan responden:

(1) Majistret gagal mempertimbangkan sama ada pihak pendakwaan telah membuktikan elemen penting 'dengan curang' oleh responden di dalam pertuduhan pemalsuan. Alasan majistret adalah dengan jelas salah (lihat perenggan 38–41).

(2) Isu penting yang mana keterangan responden tidak dicabar adalah dakwaannya bahawa dia tidak mempunyai pengetahuan terlebih dahulu tentang bentuk tandatangan Rex untuk memalsukan tandatangannya. Pegawai penyiasat kes memberi keterangan bahawa tiada keterangan yang menunjukkan bahawa responden memiliki sampel atau contoh tandatangan Rex. Oleh itu, tiada keterangan yang menunjukkan responden boleh memalsukan tandatangan Rex (lihat perenggan 53).

(3) Pakar-pakar tulisan tangan, SP1 dan SP2, berpendapat bahawa tandatangan Rex dalam wasiat berbeza dengan ciri-ciri tertentu dari contoh tandatangannya yang lain manakala SD2 berpendapat bahawa tandatangan dalam wasiat dan dalam contoh adalah serupa. Berdasarkan keterangan, mahkamah ini mendapati bahawa: (a) SP2 berpendapat sedemikian berdasarkan spesimen fotokopi tandatangan Rex, yang, mengikut keperluan Jabatan Kimia, tidak sesuai digunakan untuk perbandingan dan akan menjejaskan peperiksaan. Selanjutnya, selain dari menggunakan Video Spectral Comparator 6000, penilaian SP2 adalah berdasarkan penilaian mata kasar; (b) SP1 tidak menggunakan sebarang peralatan dan keterangannya kurang terperinci dari segi pemeriksaan dan analisis; dan (c) SD2 telah menggunakan lima jenis peralatan dan pemeriksaan, analisis dan kesimpulannya adalah teliti dan lebih dipercayai dari SP1 dan SP2 (lihat perenggan 54 & 60–70).

(4) Mahkamah ini mendapati responden merupakan saksi yang tidak mempunyai minat terhadap wasiat itu. Motif adalah faktor yang relevan dan responden memberi keterangan bahawa dia tidak mempunyai niat/motif untuk memalsukan wasiat itu. Majistret gagal menilai pembelaan tersebut dan kegagalan berbuat demikian adalah serius kerana kecurangan di pihak responden adalah penting untuk membuktikan pertuduhan pemalsuan (lihat perenggan 41, 44 & 47–48).

(5) Versi-versi fakta atau pembelaan responden tidak pernah dicabar oleh pihak pendakwaan ketika pemeriksaan balas. Perayu telah memberikan keterangan terperinci tentang perkara yang berlaku antara dia dan Rex di pejabatnya di dalam pernyataan saksinya dan memandangkan ketiadaan mens rea di pihak responden yang masih tidak dicabar, maka versinya harus diterima. Majistret gagal menangani isu ini. Ianya adalah kekhilafan undang-undang dan fakta oleh majistret (lihat perenggan 49 & 52).

(6) Afidavit SP4 di mana dia menyatakan bahawa dia menyaksikan pelaksanaan wasiat oleh Rex adalah dokumen berkaitan yang gagal diteliti oleh majistret. Afidavit itu menyokong keterangan responden. Terdapat juga sokongan lanjut apabila pegawai penyiasat, SP8, mengesahkan di dalam keterangannya bahawa SP4 telah menyatakan segala butiran fakta di dalam afidavitnya ketika memberikan pernyataan s 112 KTJ kepada polis (lihat perenggan 75–78).

(7) Majistret tidak meneliti keterangan secara keseluruhan. Hal ini ditambah dengan kegagalan pihak pendakwaan mencabar versi peristiwa responden dan melakukan pemeriksaan balas saksi-saksi mengenai perkara-perkara yang tidak relevan dengan pertuduhan. Wasiat itu adalah sah dan sama sekali tidak membuktikan bahawa responden telah memalsukan tandatangan Rex (lihat perenggan 79–80).]

Cases referred to

Ayoromi Helen v PP [2005] 1 MLJ 699, CA (refd)
Baharudin bin Ahmad v PP [2010] 7 MLJ 577, HC (refd)
Basri bin Md Desa v Pendakwa Raya [2010] MLJU 1030; [2011] 1 CLJ 884, HC (refd)
Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29; [2012] 7 CLJ 337, CA (refd)
Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)
Foo Sam Ming v Archi Environ Partnership [2004] 1 MLJ 449, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64 (refd)
State (Delhi Administration) v Pali Ram 1979 AIR 14, SC (refd)
Tan Kim Lue v PP [1971] 1 MLJ 174 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 ss 45, 47, 73
Penal Code ss 463, 464, 467

Nik Mohd Fadli bin Nik Azlan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Alex Nandaseri De Silva (with Angeline Tay Lee Yin) (Bodipalar Ponnudurai De Silva) for the respondent.

Noorin Badaruddin J:

[1] Vasanta a/l Amarasekera, ('the accused') was charged with an offence of forgery of a will under s 467 of the Penal Code before the magistrate court. He was found guilty of the charge and was convicted and sentenced to a one year and six months imprisonment from the date of sentence.

[2] Before this court, the public prosecutor appealed against the sentence imposed by the magistrate court whilst the accused appealed against the conviction and sentence.

THE CHARGE

[3] The charge against the accused reads:

Bahawa kamu pada 13.6.2005, di antara jam 9.00 pagi sehingga 6.00 petang, beralamat di Tetuan Amara & Co, D3-15, Pangsapuri Impian Kota, Jalan Kg. Atap, Kuala Lumpur, dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, kamu telah melakukan pemalsuan tandatangan wasiat Last will and Testament mendiang Adamberage Ananda Rex Alwis, (No KP: 480327-10-5695) bertarikh 13.06.2005 dan kamu adalah dengan ini telah melakukan kesalahan di bawah seksyen 467 Kanun Keseksaan.

[4] The prosecution called ten witnesses to give evidence whilst the accused had called two witnesses apart from himself, to testify at the defence stage.

BRIEF FACTS

[5] The accused was an advocate and solicitor.

[6] Sometime in June 2005, he was approached by a family friend of his, one Adamberage Ananda Rex and known to the accused as Rex ('Rex') who came to his office wanting to make a will. The accused then drafted the will.

[7] The complainant, one Nyo Aye Aye (PW3) who is from Myanmar was married to Rex since 11 November 1995.

[8] On 1 March 2006, Rex passed on.

[9] According to PW3, Rex did not leave any will. The family members started to look for any will and testament of the late Rex. PW6 was then appointed by PW3 to initiate proceeding for letter of administration.

[10] Subsequently, the family members of the late Rex had advertised notice in the newspaper seeking for any party who would have known of any will by the late Rex and to refer the matter to Messrs Fauzi, Ngah & Neasa, Advocates & Solicitors.

[11] The accused having made aware of Rex's demise had forwarded the original copy of the will to Messrs Fauzi, Ngah & Neasa, the lawyers acting for the family of the late Rex.

[12] Messrs Fauzi, Ngah & Neasa then applied to the Kuala Lumpur High Court for grant of probate and in this regards, both the accused and PW4 affirmed the affidavits for the said purpose. Both the accused and PW4 averred that they had witnessed the late Rex signing P5, the will ('the will').

[13] On 19 July 2006, the grant of probate was issued by the Kuala Lumpur High Court and the accused's brother, DW3 is the executor of the will.

[14] PW3 challenged the will and denied that Rex had ever signed the will. PW3 filed a suit to challenge the will and the suit was dismissed without a full trial.

[15] In the present matter, the learned magistrate found that the prosecution succeeded in proving beyond reasonable doubt the charge preferred against the accused under s 467 of the Penal Code.

SUMMARY OF THE MAGISTRATE'S FINDINGS

[16] In assessing the evidence, the learned magistrate relied heavily on the evidence given by the handwriting experts called by both the prosecution and the defence. They are PW1, PW2 and DW2. However, the learned magistrate preferred the evidence of PW1, a Science Officer with the Forensic Department of the Chemistry Department Malaysia and PW2, a Forensic Document Examiner at the Forensic Department of the Royal Malaysian Police accordingly on the ground that both experts were able to explain the characteristic of the signature. The learned magistrate justified as follows:

> [39] The experts stated that original documents would be the best selection to make comparison compared to photocopied documents. However, there are enough specimen signatures to allow PW2 to form her opinion. The court accepted the opinion by PW1 and PW2 where both of the experts were able to explain the characteristic of the signature. DW2's opinion was more on finding of the style and shape and habit of the person who signed the signature without able to identify what was the characteristics of the signature. The court believed that every signature will have significant characteristic and not able to be copied by other person. A forged signature could resemble the same shape but everything especially the special characteristic.
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> DW2 explained the shape of the signatures were similar but failed to identify what was the important features of all the specimen signatures. As explained by PW1 and PW2, even there is one significant difference between questioned signature and specimen, it is sufficient to conclude that the signatures were not from the same person. The difference must be material and significant and not just a variation. Based on the evaluation by both PW1 and PW2, there is one significant feature that absence in the question signature which the hiatus line. As DW2s' opinion, he concluded the combination of the 73 similarities as unique characteristic. However the court unable to agree with opinion of DW2 as the uniqueness is the combination of the similarities that found in all the specimen signatures in 12 documents. This clearly show that DW2 failed to identify the uniqueness that appear in every of the specimens. Also DW2 stated that the difference that appear between questioned signature and specimen signatures is a form of unusual variation and should not be classified distinguishing characteristic. The court find there is consistency of the specimen signatures that show variations of slope, curve, shaft and loop. The consistency of hiatus appeared in almost every specimen shows that the habit of the author. In the questioned signatures show unusual variations which show consistency of flow and writing. DW2 agreed that there is no pen lift in

A the questioned signature. The appearance of hiatus show there is a break and thus the signatures not continuation of pen movement. Therefore, court relied the opinion from PW1 and PW2.

B **[17]** Relying on the opinion of PW1 and PW2 the learned magistrate found that the signature on the will did not originate from the person who signed the specimen documents.

C **[18]** The learned magistrate further found that since there was no eye witness who could testify that it was Rex who signed the will except for the accused who have kept the will and that it was the accused who had surrendered the will to the lawyer appointed by Rex's family, such circumstances could only lead to the conclusion that it was the accused who had forged Rex's signature. The magistrate stated:

D [46] From the evidence adduced in the course of the trial, only accused has the access to the will and no one has knowledge of the existence of the will. Accused knew Rex and DW3 and agreed to help Rex with will without charging any fee or open any file in the firm for the will. There is no preparation signing will in the accused's office as no witness prepared. PW4 attendance was not planned and Rex E did not communicate for such important document. No real witness seen Rex signed the will except accused. Accused was the one that surrender the will to the lawyer appointed by the family of Rex. Thus, with the chain of evidence, there is no one could have access to will and the will was kept by the accused. Such events could only conclude that accused forged the signature in the will and that would be only F inference to be drawn in this case.

SUMMARY OF THE ACCUSED'S CONTENTIONS

G **[19]** Summarily, the accused contends that the learned magistrate had erred in failing to consider the followings:

(a) the affidavit affirmed by PW4 (D39) confirming that he had witnessed the signing of the will by the late Rex;

(b) the evidence of SP8 on the statement given by PW4 to him under s 112 H of the Criminal Procedure Code; and

(c) the accused's defence.

I **[20]** In addition, the learned magistrate is submitted to have erred in taking into account irrelevant matters in arriving at her conclusion that the accused was guilty of forgery.

SUMMARY OF THE PROSECUTION'S CONTENTIONS

[21] The prosecution submits that the learned magistrate had rightly admitted and accepted the evidence of PW1 and PW2 who are qualified experts in the fields of handwriting examinations. Further the evidence of PW3 is said to be relevant and supported by PW1 and PW2 where PW3 had testified that the signature in the will is not the accused's signature. PW3's evidence is submitted to be relevant under s 47 of the Evidence Act 1950 as she is the person who was acquainted with the handwriting of her husband, the late Rex.

[22] In regards to PW4, it is submitted that he does not qualify to be an eye witness to Rex's signature since he did not know and was not told of the content of the will and his present at the accused's office was just a coincidence and no explanation was afforded to him by the accused as to the nature of the will.

EVALUATION AND FINDINGS

[23] At the outset the primary issue for consideration in this appeal is whether the accused had in fact, forged by placing the signature purporting to be that of Rex on the will. This in turn invites a consideration of the manner of proof of a charge of forgery where ingredients required to satisfy a charge under s 467 of the Penal Code must be considered.

[24] Section 467 of the Penal Code provides as follows:

> ... Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest, or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt, acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

[25] The essential ingredients of the offence which need to be established by the prosecution are:

(a) the accused must have forged a document; and

(b) the document must be one of the classes specified in the section (see *Law of Crimes* by Ratanlal & Dhirajlal (3rd Ed) at p 2346).

[26] 'Forgery' in turn is defined in s 463 of the Penal Code as follows:

> *Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person* or to support any claim or title or to cause any person to party with property, or to enter into any express or implied contract, or

with intent to commit fraud or that fraud may be committed commits forgery. (Emphasis added.)

[27] The definition of 'making a false document' is set out in s 464 of the Penal Code. The said section provides that a person is said to have made a false document if it falls under one of the three limbs which are:

A person is said to make a false document:

(a) who *dishonestly or fraudulently* makes, signs, seals, or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document was made, signed, sealed or executed by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed;

(b) who *without lawful authority, dishonestly or fraudulently,* by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

(c) who *dishonestly or fraudulently causes any person to sign,* seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practiced upon him he does not, know the contents of the document or the nature of the alteration. (Emphasis added.)

[28] From the foregoing definitions in the Penal Code, it is evident that the issue of the forgery of the will in the instant matter can be ascertained by considering whether the accused did 'dishonestly or fraudulently' make or sign the will, or even a part of the will with the intention of causing it to be believed that the will was made by Rex, when he knew that the latter did not at any time sign or make out the will.

[29] This in turn begs the question of how forgery or the 'dishonest or fraudulent' making out or signing of the will may be proven.

[30] Under s 45 of the Evidence Act 1950 the opinion of a handwriting expert as to the genuineness of handwriting or signatures are expressly admissible on the grounds that this is a relevant fact.

[31] Section 47 of the Evidence Act 1950 provides, inter alia, for the admissibility of the evidence of a witness on the genuineness of handwriting where that witness can be said to be acquainted with the person stated to have written the disputed handwriting or signature.

[32] Section 73 of the Evidence Act 1950 allows the court or a witness to compare a disputed signature or handwriting with the genuine writing of the alleged writer.

[33] In *State (Delhi Administration) v Pali Ram* 1979 AIR 14 Sarkaria J considered the various sections of the Indian Evidence Act which contains provisions similar to that of Malaysia. He held as follows in relation to the proof of the handwriting of a person:

> ... Just as in English Law, the Indian Evidence Act recognizes two direct methods of proving the handwriting of a person:
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> (1) By an admission of the person who wrote it
>
> (2) By the evidence of some witness who saw it written.
>
> (3) These are the best methods of proof. These apart there are three other modes of proof by opinion. They are:
>
> (i) By the evidence of a handwriting expert (Section 45)
>
> (ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47)
>
> (iii) Opinion formed by the Court on comparison made by itself. (Section 73)
>
> All these three cognate modes of proof involve a process of comparison. In mode (i) the comparison is made by the expert of the disputed writing with the admitted writing of the person who is said to have written the questioned document. In (ii) the comparison takes the form of a belief which the witness entertains upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge or repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned.

[34] As for the role of a handwriting expert, it is must be noted that the Indian Court went on to caution as to the admissibility of the handwriting expert and which was carefully circumscribed as follows:

> ... *It is not the province of the expert to act as Judge or Jury.* As rightly pointed out in *Titli v Jones ILR* 56 All 428; AIR 1934 All 273 *the real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert, may form its own Judgment by its own observation of those materials.* Ordinarily, it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking such issues are for the Court or Jury to determine. *The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The Court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence* ... (Emphasis added.)

[35] Returning to the instant matter, in light of the important ingredient of intention, 'dishonestly' or 'fraudulently' that needs to be proven, the accused submits that the ingredient was omitted from the charge and thus, he is severely prejudiced as there is a difference in law between 'dishonestly' and 'fraudulently'. Reference is made to *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed, Vol 2) where the learned author explained as follows:

> There is an obvious difference between 'dishonestly' and 'fraudulently'. In order to do a thing dishonestly there must be the intention to cause wrongful loss or wrongful gain of property, but in order to do a thing fraudulently it is not necessary that there should be the intention to cause wrongful loss or wrongful gain of property ...

[36] It is trite law that in framing charges against accused person/s, the charge in question must be precisely formulated to include the specific accusation against the accused. This is in order for the accused to know and have notice of the very nature of the charges at the first opportunity, so that they are being forewarned with clarity and certainty the essential elements or ingredients that the prosecution has to establish against them in order to ensure that they are forearmed in their defence for the purpose of directing all the evidence exclusively to the specific charges (per Zamani A Rahim J (as he then was) in *Basri bin Md Desa v Pendakwa Raya* [2010] MLJU 1030; [2011] 1 CLJ 884).

[37] This court is of the considered view that the absence of the word 'dishonestly' or 'fraudulently' in the charge does not cause any miscarriage of justice to the accused. It can be gleaned from the notes of proceedings that the accused was very able to understand the charge against him and to raise his defence accordingly. The prosecution for that matter must prove the element of 'dishonestly' or 'fraudulently' on the part of the accused beyond reasonable doubt and the court must make such a finding notwithstanding the ingredient of 'dishonestly or fraudulently' is not stated in the charge.

[38] However, having acknowledged that the issue of forgery of the will may be ascertained by considering whether the accused 'dishonestly' or 'fraudulently' signed the will, this court finds that the learned magistrate has failed to consider this very essential ingredient ie dishonesty on the part of the accused, which must be proven by the prosecution. The basis for the learned magistrate's findings that the accused had forged the will can be seen in her grounds as follows:

> [46] From the evidence adduced in the course of the trial, only accused has the access to the will and no one has knowledge of the existence of the will. Accused knew Rex and DW3 and agreed to help Rex with will without charging any fee or open any file in the firm for the will. There is no preparation signing will in the accused's office as no witness prepared. PW4 attendance was not planned and Rex

did not communicate for such important document. No real witness seen Rex signed the will except accused. Accused was the one that surrender the will to the lawyer appointed by the family of Rex. Thus, with the chain of evidences, there is no one could have access to will and the will was kept by the accused. Such events could only conclude that accused forged the signature in the will and that would be only inference to be drawn in the case.

[39] This court finds the above finding is misplaced. A witness to a will need not know the contents of the will. A solicitor who had assisted in giving a draft will to a friend and who had subsequently assisted to witness the execution of the will need not charge nor open a file for the same. The fact that PW4's presence in the accused's office was not planned is irrelevant.

[40] The unchallenged facts reveal that the accused confirmed that he had asked PW4 to be a witness because PW4 had known Rex previously. PW4 came to invite the accused for lunch at the accused's office and although initially reluctant, he had then agreed when the accused told him that it was Rex or Alwis as he was known who was at the office. PW4 did not deny of Rex's presence at the accused's office. Further, there is no requirement in law for PW4 to know the contents of the will or even know the testator of the will.

[41] The negative inference made by the learned magistrate where the accused is said to be the only one who knows about the will as a copy was kept with him and therefore he must be the one who forged the signature of Rex, is again, clearly misplaced. The fact is, the late Rex had a copy of the will too. So, the accused was not the only one who has the copy of the will. No one knows of the will because it is not for the accused to tell the whole world about the will until Rex's demise when he had noticed of the fact that Rex's family was looking for any will or testament of Rex. It was the accused who had sent a copy of the same to the solicitors for the family. This court is of the considered view being a solicitor for more than 13 years standing at the time the will was executed by Rex in 2005, the accused would not have taken such a risk to his professional career to forge a document to which he gains nothing from it. The accused can be described to be a wholly disinterested witness in regards to the will.

[42] In *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, the Federal Court in assessing the issue on forgery ie whether the Court of Appeal erred in preferring the direct evidence of two witnesses ie a solicitor (DW2) and the legal clerk (DW3) who witnessed the will over the evidence of the handwriting experts stated as follows:

The Forgery Question

31 This question also relates to the issue of due execution of the will of the deceased. On this, the Court of Appeal said as follows:

A We now turn to consider the issue as to whether there was due execution of the will by the deceased. The learned judicial commissioner found against the defendants on this point on two main grounds. First, he found that the signature on the will was not the deceased's and therefore a forgery. Second, he found that there had been only one attesting witness present when execution took place and that therefore B there was non-compliance with the relevant provisions of the wills Act.

32 The Court of Appeal then reviewed in some detail the evidence on this issue of due execution. This is reflected in paras 62–80 of the judgment. *The Court of Appeal took the view that the High Court had failed to consider the element of motive on the part of Teoh Ming (DW2) and Chan Fong Lin (DW3) in respect of the execution of the* C *deceased's will; that it did not ask the question as to what possible motive these two witnesses would have in concocting such a story as they took no interest under the will nor was DW2 paid any significant amount for the preparation of the said will.*

33 Here, counsel for the appellants questioned the soundness of the proposition or observation, contending that DW2 was attempting to cover her mistakes as a result D of her inexperience, ie young, foolish and too trusting. With respect, we do not accept this. *Quite clearly, the evidence shows that DW2 had been in legal practice for about seven years at the material time. She was obviously not a novice. In any event, even accepting her inexperience, given the factual circumstances in this case, it is unlikely, in our view, that DW2 would have taken such an enormous risk to her professional career.* E *Moreover, it is a matter of professional morality and so its standard should not be measured by the length of one's practice. Everything considered, we tend to agree with the observations expressed by the Court of Appeal in the following terms:*

Once the evidence of DW2 and DW3 are carefully scrutinized and tested against the probabilities of the case, it is apparent that they are wholly disinterested witnesses. Their evidence may be safely acted upon and ought to have been acted upon by the learned F *judicial commissioner. DW2 attended on the deceased, took his instructions, prepared a will in accordance with those instructions and attended to the execution and attestation of that will.* DW2 and DW3, testified that the deceased was entirely lucid and mentally alert both at the time of giving instructions and at the time of signing the will. *We find no good reason for these two witnesses to have concocted their story as* G *neither of them had anything to gain from doing so.* (Emphasis added.)

[43] The question is, was there any reason for the accused to forge the will? What motive could the accused had to forge the late Rex's signature on the will when there is no suggestion at all that he would stand to gain anything from the H will? There is no evidence that the accused had made any form of financial or monetary gain from Rex or any of the latter's family member. Whatever transpired after the grant of probate between Rex's wife PW3 and his brother DW3 are wholly irrelevant to the issue whether the accused was guilty as per the charge.

I

[44] Motive is indeed relevant herein. The Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 raised the same question as to the motive of two defendant's witnesses DW2, the solicitor and her clerk (DW3) who attended to the preparation and the attestation of the

impugned will. Gopal Sri Ram JCA (as he then was) stated as follows:

> First, the evidence of DW2 and DW3 which we have already summarized. Here, *the learned judge failed to apply the correct tests to determine the credibility of these two witnesses. He did not ask himself the crucial question: what motive did these two witnesses have to concoct the story about the making of the will by the deceased? Neither took an interest under the will. And as Mr Thomas pointed out during argument, DW2's firm received the paltry sum of a little more than RM500 for preparing and attesting the deceased's will. As far as DW3 is concerned, she was merely a clerk in a firm of solicitors and there appears to be no motive whatsoever for her to fabricate the event concerning the execution of the will by the deceased.*

[45] The unchallenged evidence of the accused cannot be disregarded and must be accepted. The fact is, the only person who is an eye witness to the signing of the will is none other but the accused and the learned magistrate for that matter had made that finding where she stated:

> No real witness seen Rex signed the will *except the accused*.

[46] The accused's evidence was never challenged by the prosecution. The evidence of the accused is reproduced below:

> Q: Please elaborate on how the signing of the will (Exhibit P-5) took place at your office on 13.6.2005?
>
> A: On 13.6.2005, Rex came to my office at Amara & Ho at D3-15, Pangsapuri Impian Kota, Jalan Kg. Attap, 50460 Kuala Lumpur during lunch hour.
>
> I was sitting in my room at that time. My room is small. It has a table and chair for me to sit. In front of me there are 3 chairs for clients to sit. On my left is a wall of the room and on my right is the room door.
>
> I invited Rex to come into my room. Rex came in and sat across the table in front of me on the other chair closest to the wall. Rex then showed me P5.1 notice that P5 is all type written with all the particulars been inserted in it.
>
> Rex requested my help to witness him signing his will. I agreed to do so.
>
> At about the same time, my childhood friend Subramaniam a/l Sudram (Subra) (SP4) came into my office to invite me for lunch.
>
> When Subra (SP4) came into my office, he walked into my room straight and he saw Rex seated there.
>
> I requested Subra to become a witness to Rex signing his will. Initially Subra was reluctant as he did not recognize Rex. When I told Subra that this was Rex De Alwis, Subra nodded his head said that he knew Rex but couldn't recognize Rex. Subra then agreed to be a witness. Subra then sat in the chair closest to the door.
>
> After Rex signed 2 copies of his will. I then put my chop
>
> Vasanta a/l Amarasekera and signed as a witness.
>
> Immediately I gave it to Subra.

Subra is a left hander. He took the will (P-5) and wrote his full name 'Subramaniam s/o Sundram' together with his identity card number '550319-10-5813' on it. Subra then signed the 2 copies of the will above the name and identification card number as a witness. The execution of the will (P5) took a few minutes.

I gave Rex a copy of the will. I kept the other copy of the will as an office copy.

Q: Did Subra know Rex?

A: Yes. Subra and I used to play badminton in the Buddhist temple in Brickfields with a few people including Rex and his brother, Maurice in the 1980s.

Q: Do you know why Subra did not recognize Rex?

A: Rex had aged and looked a lot older since the time we used to play badminton at the Buddhist temple in Brickfields, in the 1980s.

Q: In what order was this will signed?

A: Rex signed the will first. I then signed as a witness and was followed by SP4

Q; In what capacity were you signing as in the page marked as Page 4 of Exhibit P-5?

A: I signed as a witness to the will.

[47] It is important to note that the accused had testified that there was no intention/motive on his part to forge the will. The accused stated:

Q: What do you have to say about the charges that have been laid against you?

A: I was wrongly charged for an offence which I did not commit. I did not forge Rex's will. I do not have any reason or motive to do so. I only assisted Rex by preparing a draft will for him and then becoming a witness to his will. I have nothing to gain by committing any forgery of Rex's will. I was only helping a friend by becoming a witness to the will. I can confirm that Rex signed the will in front of me and SP4 on the date stated in the will, that is 13.6.2005.

[48] The learned magistrate fails to evaluate the above defence by the accused and the failure to do so is fatal because dishonesty on the part of the accused is crucial to prove the charge of forgery.

[49] Furthermore, the accused's version of facts or defence was never challenged by the prosecution in cross-examination. In *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699, the Court of Appeal in finding that that the High Court judge had failed to consider the fact that the material part of the defence of the accused was not subject to any cross-examination had held:

(2) *The accused ought to have been cross-examined on the defense advanced by her and the failure of the prosecution to do so amounts to an acceptance of the material parts of her defense. This meant that she has established that she had no knowledge* that what was found in her custody were in fact dangerous drugs with the results that there is no evidence to show that she was in possession of them. (Emphasis added.)

[50] Upon scrutiny of the notes of proceedings, this court agrees that with learned counsel for the accused that the cross-examination on the accused can be summarised as follows:

(a) whether the accused had opened a file for preparing the will;

(b) why the accused did not give a copy of the will to PW3, the wife of the late Rex;

(c) why the accused did not charge fees for the drafting of the will;

(d) PW4, who was the other witness to the execution of will was not a close friend of the late Rex; and

(e) a lawyer must open a file even though the work was done pro-bono.

[51] This court finds that all the above cross-examinations are irrelevant and do not in any way proved that the accused had forged the will on 13 June 2005.

[52] At no time the issue of intention or motive on the part of the accused was challenged by the prosecution. Therefore, the accused's version cannot be rejected because when the prosecution chooses not to cross-examine a witness on a material fact, the inference would be the prosecution accepts the evidence (see *Tan Kim Lue v Public Prosecutor* [1971] 1 MLJ 174). The accused had given a detailed account on what happened between him and Rex at his office in his witness statement and in the absence of mens rea on the part of the accused which remained unrebutted, it must therefore be accepted. The learned magistrate failed to address this issue. This is an error in law and in fact on the part of the learned magistrate.

[53] Interestingly, one would then ask, how could the accused forged Rex's signature when the accused's testified that he had no prior knowledge what Rex's signature looked like and that he was not even familiar with Rex's signature. This evidence was not even challenged. There is no evidence to show that the accused had seen or had in possession Rex's sample signature or that he was familiar or have knowledge of the signature. The investigating officer for that matter had confirmed that there was no evidence that the accused had possession of Rex's signature, samples or specimens. So there is no evidence at all of how the accused could have forged Rex's signature.

[54] The handwriting experts, PW1 and PW2 took the view that there is a difference in the signature in terms of certain characteristics in the signature on the will and the samples whilst DW2 testified that the signature in the will and the samples are sufficiently similar. In other words, from the evidence of the handwriting experts, it can be deduced that the signatures in the will and the samples are not completely different. Therefore, if indeed the accused had forged the late Rex's signature he must be familiar or have knowledge or seen

the latter's signature to be able to forge the signature. No cross-examination on this issue was put to the accused. Again, the learned magistrate fails to evaluate and consider this crucial piece of evidence ie that the accused had no prior knowledge what Rex's signature even looked like and this again, is another error on the part of the learned magistrate.

[55] In evaluating the findings made by the Court of Appeal in regards to the alleged signature of the deceased said to be forged therein and the general guide to the judicial appreciation of handwriting evidence against direct evidence, the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors*, had agreed with the findings made by the Court of Appeal that direct evidence from a disinterested witness who has seen the signing of the will must be preferred against the handwriting expert opinion. The Federal Court stated the followings:

> [34] The Court of Appeal then dealt with the High Court's finding of forgery as regards the alleged signature of the deceased on the will. Here, counsel for the appellants contended that the Court of Appeal committed a fundamental error in holding that 'direct evidence inevitably prevails over handwriting expert's opinion which should therefore be discounted'. He argued that that approach was wrong and the reliance by the Court of Appeal on the English case of *Newton v Ricketts* (1861) 11 ER 731 was misplaced because in that case there was no challenge to the direct evidence which was deemed to have been accepted (see paras 58 and 59 of his written submission). He further contended that a court had to have regard to all the evidence before concluding on the genuineness of a signature, drawing attention to *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61. Counsel made reference to para 109 of the Court of Appeal's judgment which states: We consider it to be a well-established general guide to the judicial appreciation of handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document, then it is a safe course for a court to prefer the direct evidence.
>
> [35] Again, the Court of Appeal cited *Newton v Ricketts*. It is perhaps pertinent to note that the Court of Appeal also drew support from the Indian case of *Kameswara Rao v Suryaprakasarao* AIR 1962 AP 178 in particular the following passage of the judgment therein: The opinion of a handwriting expert is, no doubt, admissible under s 45 (Evidence Act). *What value is to be attached to that opinion in a given case is however, entirely a different matter. An expert's opinion with respect to handwriting must always be received with great caution. There certainly may be, and perhaps are cases where the handwriting expert's opinion may be of assistance to the court in coming to a conclusion as to the genuineness of disputed handwriting. But the art of forming opinion by comparison of handwriting is essentially empirical in character and error is seldom inseparable from such opinions. Where however, there is direct and trustworthy evidence of persons who had actually seen the signing of the document by the testatrix, it is not necessary to refer to or rely on the expert opinion.*
>
> [36] *In emphasizing the part italised above, the Court of Appeal took the view that the High Court had erred in unreasonably rejecting the evidence of two attesting witnesses*

DW2 and DW3 who had actually witnessed the execution of the will by the deceased. The court obviously regarded them as direct and trustworthy witnesses. Moreover, when the statement of the court cited above is examined in the context of the observations made in Kameswara Rao no flaw can be attributed to that statement. (Emphasis added.)

[56] Henceforth, this court is taken to the evidence of PW1, PW2 and DW2 and it is imperative to take guidance from the authorities on evidence of handwriting expert.

[57] Firstly, in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61, the Federal Court reminded as follows:

It is trite law that the principal object of expert evidence is to assist the court to form its own opinion. An expert should give his reasons. The court is the final arbiter, not the experts or eyewitness. Despite the wealth of authorities available on this subject, the errors that appear in judgments invite us to elaborate on this matter.

The Supreme Court of India's decision in *Murarilal v State of MP* AIR 1980 SC 531 at p 534 is illustrative and some paragraphs of the judgment are worth reproducing:

(4) We will first consider the argument, a stale argument often heard, particularly in criminal courts, that the opinion evidence of a handwriting expert should not be acted upon without substantial corroboration. We shall presently point out how the argument cannot be justified on principle or precedent. We begin with the observation that the expert is no accomplice. There is no jurisdiction for condemning his opinion-evidence to the same class of evidence as that of an accomplice and insist upon corroboration. True, it has occasionally been said on very high authority that it would be hazardous to base a conviction solely on the opinion of a handwriting expert. But, *the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses — the equality of credibility or incredibility being one which an expert shares with all other witnesses — but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion.* The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-print has attained near perfection and the risk of an incorrect opinion is practically non-existent. *On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher.* But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever *the opinion may be backed by the soundest of reasons.* It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness ... *His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty 'is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence.*

(5) From the earliest times, courts have received the opinion of experts. As long

ago as 1553 it was said in *Buckley v Rice Thomas* (1554) 1 Plowden 118: 'If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation'.

(6) *Expert testimony is made relevant by s 45 of the Evidence Act and where the court has to form an opinion upon a point as to identity of handwriting, the opinion of a person 'specially skilled' in questions as to identity of handwriting' is expressly made a relevant fact* ... The Evidence Act itself (s 3) tells us that 'a fact is said to be proved when, after considering the matter before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. It is necessary to occasionally remind ourselves of this interpretation clause in Evidence Act lest we act on artificial standard of proof not warranted by the provisions of the Act ... It is also to be noticed that s 46 of the Evidence Act makes facts, not otherwise relevant, relevant if they support or are inconsistent with the opinion of experts, when such opinions are relevant. So, corroboration may not invariably be insisted upon before acting on the opinion of a handwriting expert and there need be no initial suspicion. But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. *The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it.*

...

(11) We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallized into a rule of law, that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. *But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight.* (Emphasis added.)

[58] The Court of Appeal in *Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals* [2013] 2 MLJ 29; [2012] 7 CLJ 337 in facing with two conflicting expert evidence on the cause of the collapse of the first plaintiff's wall stated the followings:

[48] ... *In treating conflicting expert evidence, the court, besides examining the credibility of the experts, should also examine the scientific grounds and facts relied by the experts and whether, when taken in totality, the inferences drawn from their findings are*

sound or otherwise (see *Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party)* [1984] 2 MLJ 202; [1984] 1 LNS 3).

[49] In our judgment, the learned *High Court judge fell into serious error in failing to give adequate consideration to the evidence of the defendants'expert witness DW7, who had prepared three reports on the cause of the collapse of the first plaintiff's retaining wall.* Two of the reports were based on his investigation on site; and the third report was based on drawings supplied by the first plaintiff.

[50] We have carefully examined the reports of this witness and *we are of the view that his evidence as to the cause of the collapse is more credible as opposed to the evidence of the plaintiffs' expert witness, PW5.* (Emphasis added.)

[59] In *Public Prosecutor v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64, Hashim Yeop A Sani J (as he then was) stated the followings:

It is settled law that evidence by a handwriting expert can never be conclusive because it is only opinion evidence — see *Ishwari Prasad v Mohd Isa* AIR 1963 SC 1728.

The assessment of evidence of handwriting experts was also dealt with in *Indar Datt v Emperor* AIR 1931 Lahore 408 413 *Indar Datt v Emperor* AIR 1931 Lahore 408 413. In that case *In re B Venkata Row* (1913) ILR 36 Mad 159; 14 IC 418; 13 CR LJ 226 was cited and also a quotation from Dr Lawson's work on the *Law of Expert and Opinion Evidence*, which runs as follows: 'The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. *It must be confessed however that it is of the lowest order of evidence or of the most unsatisfactory character. We believe that in this opinion experienced laymen unite with the members of the legal profession. Of all kinds of evidence admitted in a court this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence.*

In *Srikant v King Emperor* AIR 1963 SC 1728, *two learned judges of the Allahabad High Court observed that:*

> *To base a conviction upon the evidence of an expert in handwriting is, as a general rule, very unsafe.* (Emphasis added.)

[60] Returning to the instant matter, the learned magistrate found that PW1, PW2 and DW2 have adequate skills and experience in analysing handwriting including signatures. However, the learned magistrate was of the opinion that PW2 was better equipped with better equipment and knowledge in forming her opinion. According to the learned magistrate, DW2's methodology was conventional because he used magnifier, overlay and microscopic whilst PW2 used spectral comparator to which better view of the signature can be obtained. In regards to PW1, the learned magistrate found that even though she did not use any equipment to examine, PW1 had clearly look into both signatures and was able to see the differences and similarities without the aid of any equipment.

[61] PW1 took three working days to prepare her report. No equipment was used.

[62] DW2 took about one to two months to examine the questioned signature on the will and the specimen signatures. He used several equipment in conducting his analysis:

(a) BestScope BS3020T;

(b) Protractor;

(c) Overlay;

(d) Grid Ruler; and

(e) Hand Magnifier.

[63] DW2 has produced his report which sets out the analysis and comparison of the questioned signature on the will with ten other signatures of Rex. It can be seen from the general outlay of a blown up image (magnified four times or 400%) of the questioned signature, various terminologies, labels at various strokes and forms were marked showing the characteristics of Rex's signature. Detailed reasons were given by DW2 for using all the equipment mentioned in the above in his testimony. DW2 reached his conclusion after making multiple comparisons in numerous charts in his expert report.

[64] In giving his opinion that the questioned signature is likely to be genuine, DW2 answered as follows:

ADS: Can you explain your findings in para 4

SKS: Because of the presence of fine details, all these are found in the questioned signature and likely the questioned signature is genuine

ADS .The presence of finer details represents what?

SKS: That it is likely to be genuine signature

ADS: Similarities in page 11. Here you say altogether I found 73 matching signatures ... can you tell us in brief, what are the similarities you found?

SKS: Page 16, the curvature of top curve

ADS: Writing movement. It starts at page 18. What you mean by *writing movement?*

SKS: The curves are graceful or not. The staff goes straight down and no wavering. Also continuity and coherence. The coherence means that the parts are close together

ADS: page 18, maybe you can give us an example

SKS: The more angular turn is found in X4. There is a slight curve and there is an angular turn ADS: What does this show to you

SKS: The abrupt turn is expected in Q. Abrupt turn is when there is a straight and sudden curve.

ADS: show us where is this found in Q

SKS: Chart 4. There is a straight stroke and sudden curve. S11, straight stroke and internal consistency

AKS: What does this indicate?

SKS: lt is normal ... Page 15, point no. 39. There is a flow. The writing movement is same but just variation of hand pressure

ADS: Show us Q and tell us why you say is similar SKS: Same movement but just different variation.

[65] Where PW2 is concerned apart from using the Video Spectral Comparator 6000, her assessment was based on a naked eye evaluation.

[66] The investigating officer PW7 provided ten specimens signature to PW2 and two were photocopy specimens (P11(a) and P11(b)). According to D52, a document which lays down the requirements for examination of documents from the Chemistry Department of Malaysia, the documents sent for examination must be in the form of original document and that:

Dokumen salinan fotostat atau salinan karbon tidak sesuai untuk perbandingan dan akan menjejaskan pemeriksaan.

[67] In other words, a photocopy document is inappropriate to be used for comparison and will affect the examination. This was agreed upon by PW2.

[68] PW2 then formed her opinion premised on the photocopy specimen ie P11(a). The remaining nine specimens (out of which only eight were originals) were abandoned by PW2 in her analysis.

[69] It cannot be disputed that variations in one or more genuine signature authored by the same person are bound to happen. The court's attention is brought to the literature authored by Dr Wilson R Harrison entitled *Suspect Documents Their Scientific Examination* (3rd Indian Reprint) 2003 states as follows:

As no two genuine signatures are identical, it follows that in signatures, as with handwriting in general, a certain amount of natural variation in letter design must be expected and consequently allowed for, whenever signatures are being compared to determine whether or not they are of common authorship.

Nothing is more calculated to bring the comparison of handwriting into contempt than the attitude of the witness who declares a genuine signature to be a forgery because it departs in some detail of letter design from either of the two genuine specimens he has used as the basis of his comparison. This kind of folly has happened within the experience of the author. (Emphasis added.)

[70] It is clear that PW1's evidence is lacking in detail in terms of examination and analysis. It is of the considered view that the meticulous examination, analysis and conclusion formed by DW2 are more credible than the evidence of PW2 which are questionable and compromised as they go against the requirement of the Chemistry Department itself.

[71] Moving on, it can be observed that the learned magistrate seems to be more concerned with the credibility of PW3, the wife of the late Rex and DW3, the late Rex's brother. This court is of the considered view that nothing turns on from their evidence to prove the guilt on the part of the accused. One thing is certain, DW3 was never at the accused's office at the time Rex brought the will to be attested and there is no evidence to show that it was DW3 or any of Rex's family member who had asked the accused to prepare the will. At the end of the day, PW3's challenge on the validity of the will by filing a civil suit against DW3 was rejected by the High Court, Court of Appeal and Federal Court.

[72] PW4 is in fact an important witness. However, the evidence of PW4 who was present at the material time, was only considered in passing by the learned magistrate. The learned magistrate found that PW4 cannot be said to be an eye-witness to Rex signing the will because PW4's attendance was not planned. The prosecution on the other hand harped on the fact that the will was not explained to PW4 and therefore the will cannot be said to be a legitimate will. These are irrelevant and a non-issue herein.

[73] The crux of the PW4's evidence can be seen from the following excerpts:

> On that particular day, my intention to meet Mr Sunir, his official name si Mr Vasanta Amarasekara, my intention is to invite him for lunch that was my only intention. So, I parked the car down stairs and I rush up and rush in, and I shouted 'Sunir, let's go to lunch'
>
> Within a second he just looked at me, less than one minute and ask me, 'can you come and sign this will?' My automatic reaction was. 'I'm hungry, lets go down and eat first. And he says, 'no, no, no, please sign this will and he mention a very long name.
>
> I said, 'I can't sign because I did not know the name of the person' and that when he interjected and said its 'Alwis, Alwis' and then I remembered who Alvis was because I used to work in Buddhst temple in Brickfields and help temple.
>
> I'm very familiar to this name because he used to play badminton. Then, I said family will? He said yes, I signed, so I was walking out I could see somebody sitting from my corner of my eye and I just walk out because I am very hungry and all this happened in less than a minute, then I left.

[74] It is therefore clear from the evidence of PW4 in the above, that there was no denial on the part of PW4 that Rex or Alwis/Alvis as he was known him was present at the accused's office.

[75] It is pertinent to note that there is an affidavit affirmed by PW4 (D39) on 5 June 2006 confirming that PW4 had identified himself as a friend who had known the accused and the deceased (Rex) in this case. It clearly shows that PW4 had described the deceased (Rex) as a 'friend that he had known'. This evidence corroborates the accused's evidence that he had reminded PW4 of Rex whom he had known before.

[76] Pertinently, PW8 the investigating officer confirmed that when PW4 gave his statement under s 112 of the Criminal Procedure Code, the latter had confirmed that he was a witness to Rex's will. PW4 had also confirmed that there were two witnesses to Rex's will, the accused and himself. PW8 had confirmed that in PW4's affidavit (D39), PW4 had affirmed that he had witnessed Rex signing the will, and this was repeated by PW8 in cross examination. This again, corroborates the accused's version of facts that PW4 was another person who had witnessed the signing of the will by Rex on 13 June 2005.

[77] PW4's affidavit (D39) is a contemporaneous document and it must be preferred against the oral evidence given by PW4 which can be seen to be tardy and sketchy. In the affidavit, it is clear that PW4 had witnessed Rex signing the will. PW4 averred as follows:

> 2. Saya menyatakan di sini bahawa 'Wasiat' simati Ademberage Ananda Rex De Alwis bertarikh 13 haribulan Jun 2005 di mana *tandatangan simati diturunkan di hadapan saya dalam wasiat tersebut.* (Emphasis added.)

[78] It is a principle of law established through plethora of authorities that contemporaneous documents must be preferred to oral evidence (see: *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; *Foo Sam Ming v Archi Environ Partnership* [2004] 1 MLJ 449 and *Baharudin bin Ahmad v Public Prosecutor* [2010] 7 MLJ 577). D39 is a document made on oath and PW4 had confirmed that he had executed D39 on 5 June 2006 about a year after the will was executed. It is of the considered view that D39 is a contemporaneous document. Had the learned magistrate evaluated D39 and given proper weight to the same, it cannot be disputed that PW4 was in fact a witness to the will. Importantly, there was no evidence in fact to suggest that Rex did not sign the will at the accused's office in the presence of both the accused and PW4. As such, this court finds that the learned magistrate erred in making the following findings:

(a) that 'there is no eye witness who seen Rex signed the will. PW4 has no knowledge of the content of the will. The accused only asked PW4 to sign the will without further explain content of the will or witness the person is Rex'; and

A (b) that 'there is no direct evidence in this case. There is no eye witness accept the accused in this case. PW4 did not witness Rex sign the will'.

[79] Where crucial evidence highlighted in the foregoing including the accused's version of what transpired on 13 June 2005 was not even challenged by the prosecution and instead irrelevant matters were being put in cross-examination, the validity of the will remain intact and has not in any way proves that the accused had forged the will on 13 June 2005.

CONCLUSION

[80] In light of the above, this court finds that there was no or insufficient judicial appreciation of the entire evidence adduced before the magistrate court. The accused's appeal was allowed. The conviction and sentence under s 467 of the Penal Code was set aside and the accused was discharged and acquitted. The appeal against sentence by the prosecution was dismissed.

Prosecution's appeal dismissed; conviction and sentence set aside and respondent discharged.

Reported by Ashok Kumar